



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: MAY 12, 2023

IN THE MATTER OF:

Appeal Board No. 628206

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective December 8, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by WHITE PLAINS HOSPITAL ASSN prior to December 8, 2021 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. At the hearing, the Judge added the alternate issue disqualifying the claimant from receiving benefits, on the basis that the claimant voluntarily separated from employment without good cause pursuant to the doctrine of provoked discharge. Due process was accorded. By decision filed February 16, 2023 (), the Administrative Law Judge overruled the initial determinations.

The employer appealed the Judge's decision to the Appeal Board, insofar as it sustained the initial

determinations.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant was employed by a hospital as a receiver/stocker in the kitchen for four years until December 7, 2021.

On August 30, 2021 the employer notified its employees that in order to maintain employment they must be vaccinated, unless medically exempt, against the COVID-19 virus, by having at least a first dose by September 27, 2021. This requirement was made pursuant to an emergency regulation issued by the Public Health and Health Planning Council and authorized under Title 10 of the New York State Public Health Law. The mandate required all healthcare workers to obtain their first dose of the COVID-19 vaccine by September 27, 2021, to help mitigate the COVID-19 pandemic. It did not provide for religious exemptions. The claimant received the memo and applied for a religious exemption. The claimant's request for a religious exemption was granted.

On or about November 1, 2021 the claimant's religious exemption was revoked by the employer when they became aware that the revocation of religious exemptions under the mandate was legal. The employer informed the claimant that he must comply with the vaccine mandate by November 15, 2021, and if he did not become vaccinated by that date his employment would end. The claimant did not respond to the employer's request for proof of vaccination. On December 7, 2021 the claimant was notified by the employer that due to his refusal to become vaccinated his employment had ended

OPINION: The credible evidence establishes that the claimant's employment ended on December 7, 2021, because he refused to receive the COVID-19 vaccine, a condition of continued employment. There is no dispute that the claimant was aware of this requirement and its applicability to him as a worker in a healthcare facility, or that he was further aware that she could not continue his employment if he did not comply. It is further undisputed that the employer discharged the claimant because he chose not to get the vaccine and that if he had been vaccinated as required, he could have continued in his employment.

However, because the claimant was aware of the vaccine mandate and that he could be separated from employment if he chose not to be vaccinated, we find that he provoked his own discharge. A provoked discharge occurs when a claimant voluntarily violates a legitimate known obligation, leaving the employer no choice but to discharge him. A provoked discharge is considered a voluntary leaving of employment without good cause for unemployment insurance purposes and subjects a claimant to a disqualification from receiving benefits (see, *Matter of DeGrego*, 39 NY2d 180 [3d Dept.1976]).

In this matter, the obligation in question was compliance with the employer's vaccine requirement. It is significant that this requirement was established for the purpose of complying with the State of New York's mandate that all healthcare workers be vaccinated against COVID-19 during the worldwide pandemic. The Courts have long held that New York State has the authority to regulate public health, including mandating vaccination to curb the spread of disease (see *Matter of Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601 [2018], which upheld mandated annual influenza vaccinations for children attending childcare programs in New York City; *Matter of C.F. v. New York City Dept of Health & Mental Hygiene*, 191 AD3d 52 [2d Dept 2020], holding that a municipal agency had the authority to require immunizations of adults in an area where there was an outbreak of measles if authorized by law; and *Matter of New York City Mun. Labor Comm. v. City of New York*, 73 Misc.3d 621 [Sup. Ct. N.Y. Cnty. 2021], where the Court declined to grant a temporary restraining order of the implementation of the New York City Department of Education's COVID-19 vaccine mandate for its employees, noting that there was no dispute that the Department of Health and Mental Hygiene had the authority to issue the mandate and that the Court "...cannot and will not substitute [others'] judgment for that of New York City's public health experts," citing *New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82 v. Cuomo*, 64 NY2d 233, 237-40 [1984]). Because of the severity of the ongoing COVID-19 crisis and healthcare providers' need to protect the health of their employees and

patients, the emergency regulation requiring all healthcare employees to be vaccinated against COVID-19 was justified by a compelling governmental interest. We therefore find that the employer's requirement that the claimant be vaccinated was a legitimate obligation and that the employer had no choice but to end the claimant's employment when he refused to meet it. However, we also find that, even in the absence of the state mandate, the employer's requirement to become vaccinated was reasonable because it was imposed to protect health and safety and the claimant could have preserved his employment by complying with the employer's requirement (See Appeal Board Nos. 624830 and 621758). We therefore conclude that even if the doctrine of provoked discharge is not applicable, a claimant who fails to take a step that is reasonably required for continued employment is deemed to have voluntarily separated from employment without good cause (See *Matter of Wackford*, 284 AD2d 770 [3d Dept 2001]).

We now turn to the claimant's contention that his refusal to vaccinate was

based on religious concerns for which he sought, and which exemption was revoked. We note that the Supreme Court of the United States has held that "... an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (see *Employment Div. v. Smith*, 494 US 872, 879 [1990]). The Court determined that provided a law is neutral and not aimed at a specific religion, is generally applicable, and pertains to an area of law the government has the ability to regulate, it cannot be preempted by a religious practice. In the matter now before us, there is no allegation that the state cannot regulate the healthcare industry, that the law is not generally applicable to those in that industry, or that it targeted a specific religion. Further, in *Dr. A et al v. Hochul*, 142 S.Ct. 552 (2021), the Court denied an application for injunctive relief in a challenge to New York State's law removing religious exemptions from its COVID-19 vaccine mandate for hospital workers. Additionally, the Second Circuit in *We the Patriots USA, Inc. v. Hochul* 2021 U.S. App. LEXIS 32921 (2d Cir 2021), upheld New York's COVID-19 vaccine mandate for hospital employees without religious exemptions. We note that *Medical Professionals for Informed Consent v. Bassett et al.* 2023 NY Slip Op 23020, relied upon by the Administrative Law Judge, has been stayed pending appeal and therefore is not controlling.

In light of the foregoing, we find that the claimant's personal beliefs do not outweigh the employer's interest in protecting the health and safety of its employees and patients. The claimant therefore has not substantiated that he had good cause for ending continuing employment. Accordingly, we conclude that he was properly denied benefits and that the issue of misconduct remains moot.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective December 8, 2021, on the basis that the claimant voluntarily separated from employment without good cause, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER